IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 8, 2009 Session

BYRD AND ASSOCIATES, PLC v. JENNIFER SILISKI AND ALAN SILISKI

Appeal from the Chancery Court for Williamson County
No. 31546 Jeffrey S. Bivins, Judge

No. M2008-00066-COA-R3-CV - Filed August 19, 2009

The dispositive issue on appeal pertains to a party's fundamental and constitutional right to a jury trial guaranteed by Tenn. Const. art. I, § 6, and whether the defendants impliedly waived their right to a jury trial by being late for court. Both defendants had timely demanded a jury trial in their respective answers to the complaint; however, neither defendant was in the courtroom when court convened at 9:10 a.m. on the morning of trial. When the defendants appeared, the trial judge required that the case proceed to trial without a jury. The facts in this case reveal that the case was set to begin at 9:00 a.m. on July 5, 2007, that the trial judge convened court at 9:10 a.m., that immediately upon taking the bench the trial court ascertained that the defendants were not in the courtroom, and that without making any inquiry concerning their absence made the finding that the defendants had implicitly waived their right to a jury trial. The facts also reveal that one of the defendants, Alan Siliski, had been in the courtroom prior to court being convened, but went outside to await the arrival of his attorney, who had called to advise he was running late. As for the other defendant, Jennifer Siliski, the facts reveal that the plaintiff voluntarily dismissed its case against her during a pretrial conference three days earlier; however, a few hours after the conference the plaintiff informed the court, but not Ms. Siliski, that it had reconsidered and determined that Ms. Siliski was an indispensable party, therefore, it was not dismissing its case against her. Plaintiff contends Ms. Siliski received word of the change via a circuitous route from plaintiff's counsel to Mr. Siliski's counsel to Mr. Siliski, who was to inform Ms. Siliski that she was again a party in the fraudulent conveyances action. Ms. Siliski, however, insists that no one informed her that she was once again a party. It is undisputed that the plaintiff did not directly inform Ms. Siliski of this important fact and no one else testified that they personally informed Ms. Siliski of the change of circumstances prior to the morning of the trial. We have determined the above facts are not sufficient to support a finding that either defendant impliedly waived his or her right to a jury trial because a waiver should not be inferred without reasonably clear evidence of an intent to waive. Therefore, the defendants are entitled to a jury trial as each defendant had timely demanded. Accordingly, the judgments entered against the defendants as a result of the bench trial are vacated, and this matter is remanded for a jury trial on the issues.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Chancery Court Vacated and Remanded

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which RICHARD H. DINKINS, J. and ROBERT W. WEDEMEYER, SP. J., joined.

Jennifer Siliski, Franklin, Tennessee, Pro Se.

Thomas F. Bloom, Nashville, Tennessee, for the appellant, Alan Siliski.

Rebecca E. Byrd, Franklin, Tennessee, for the appellee, Byrd & Associates, PLC.

OPINION

The plaintiff in this action, Byrd & Associates, PLC, ("Plaintiff"), is a Tennessee corporation engaged in the practice of law. The principal of the law firm is attorney Rebecca E. Byrd. The defendants are Jennifer Siliski and Alan Siliski. Jennifer Siliski was previously represented by Plaintiff pursuant to a Retainer Agreement entered into on January 23, 2004, regarding a matter the parties identified in the agreement as "animal seizure."[1] Defendant Alan Siliski is the former husband of Jennifer Siliski; he has not been represented by Plaintiff.

On November 12, 2004, Plaintiff filed a Complaint against both defendants in which Plaintiff asserted two claims against Jennifer Siliski and one claim against Alan Siliski. For its first claim, Plaintiff asserted a breach of contract claim against Jennifer Siliski, which arises out of the Retainer Agreement between Ms. Siliski and Plaintiff entered into on January 23, 2004. In the Complaint, Plaintiff contends it performed all of the professional services required of it under the Retainer Agreement and that Jennifer Siliski breached the agreement by failing to pay Plaintiff for the services it rendered on her behalf. For its second claim, Plaintiff asserted a claim of fraudulent conveyance against both defendants, which pertains to the sale by Jennifer Siliski of her home to Alan Siliski on March 3, 2004. In the Complaint, Plaintiff contends that Jennifer Siliski conveyed all of her interest in her home to her former husband, Alan Siliski, "for the purpose of defrauding plaintiff and hindering and delaying the collection of the indebtedness evidenced by the Retainer Agreement. . . ." As for Alan Siliski, Plaintiff alleges that he was aware of the relationship between Plaintiff and Jennifer Siliski and that he had constructive notice of Plaintiff's security interest in the home. Although it was not well plead, the trial court subsequently determined that Plaintiff was seeking to have the conveyance declared void pursuant to the Uniform Fraudulent Transfer Act, Tenn. Code Ann. § 66-3-301 *et seq*.

Ms. Siliski originally retained Plaintiff on January 23, 2004, to represent her in matters regarding the removal of over 230 animals from her home. Thereafter, Plaintiff also represented Ms. Siliski in matters regarding the removal of her children by the Department of Children's Services

[1] *See State of Tennessee v. Jennifer Siliski,* 238 S.W.3d 338 (Tenn. Crim. App. 2007).

due to the unsanitary conditions in her home. In short order, Ms. Siliski incurred substantial legal fees. Soon thereafter, Plaintiff conveyed its concerns to Ms. Siliski that she was delinquent on her account, at which time Ms. Siliski suggested that her home could secure payment of her legal fees. On February 27, 2004, Plaintiff recorded the Retainer Agreement with the Williamson County Register of Deeds Office. On March 3, 2004, Ms. Siliski executed a warranty deed conveying her home to her ex-husband, Alan Siliski, for the consideration of $176,000.[2] The deed was duly recorded with the Williamson County Register of Deeds. Plaintiff was not informed of the conveyance, and upon the subsequent discovery of the conveyance, filed this action on November 12, 2004.

Over the next two and one-half years, the parties engaged in a relatively unproductive series of skirmishes by motion, counterclaims, and third party claims, as well as proceeding with discovery. In the interim, Ms. Siliski's attorney withdrew. Thereafter, Ms. Siliski represented herself in this matter. The case was finally set for trial by jury, to begin at 9:00 a.m., on July 5, 2007.

On the morning of July 2, 2007, the parties appeared before the court for a pre-trial conference. Plaintiff was represented by Rebecca Byrd, the president and sole stockholder of the firm. Ms. Siliski appeared *pro se.* Mr. Siliski and his attorney, John Herbison, also attended. During the pre-trial conference, the decision was made to bifurcate the trial of the two claims, separating the trial of the fraudulent conveyance claim from that of the breach of contract claim. Ms. Byrd announced during the conference that she had decided Ms. Siliski was not a necessary party to the fraudulent conveyance claim and that she was voluntarily dismissing her from that claim, but not the breach of contract claim. Ms. Siliski was then told by the trial judge that she was no longer a party to the fraudulent conveyance action and was not required to attend that trial, as the two claims were bifurcated.[3] The court then announced that the breach of contract action against Ms. Siliski would be tried first, that it would start at 9:00 a.m. on July 5, and that the fraudulent conveyance claim would start upon the conclusion of the breach of contract claim. The conference then ended.

Sometime later that day, Ms. Byrd realized that Ms. Siliski was a necessary party to the fraudulent conveyance action; therefore, she scheduled a telephone conference for 3:00 p.m. to inform the court and the defendants of this important change. Someone from Plaintiff's office called to inform Ms. Siliski that a telephone conference would take place at 3:00; however, Ms. Siliski did not participate in the telephone conference because she had become ill.[4] The only participants to the 3:00 p.m. telephone conference were Ms. Byrd, Mr. Herbison, and the trial judge. During the telephone conference, Ms. Byrd announced that she realized Ms. Siliski was a necessary party; thus, Plaintiff was rescinding its earlier decision to dismiss Ms. Siliski from the fraudulent conveyance claim. During the telephone conference, it was also decided to reverse the order of the two trials,

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[2] The sales price was well-below the appraised value of the home.

[3] No order was entered dismissing Ms. Siliski as a party-defendant.

[4] At a subsequent proceeding, Ms. Siliski stated that she was not told the reason for the 3:00 p.m. conference and that she informed the person who called her from Plaintiff's office that she could not participate as she was ill.

which had been bifurcated, and the trial of the fraudulent conveyance claim was now to be tried first, to start at 9:00 a.m. The trial judge instructed Mr. Herbison, Mr. Siliski's attorney, to inform Ms. Siliski of the changes. Mr. Herbison, however, made no attempt to contact Ms. Siliski; instead, he instructed his client, Mr. Siliski, of the events of the telephone conference and requested that he notify Ms. Siliski. Plaintiff prepared a letter memorializing the events of the 3:00 telephone conference, the certificate of service on which states it was sent by fascimile to Mr. Herbison and via hand-delivery to Ms. Siliski. Ms. Siliski, however, denies receiving any notification concerning what transpired during the telephone conference, and no one claims to have personally told her of what occurred during the telephone conference.

The trial of the fraudulent conveyance claim was to begin at 9:00 a.m. on July 5, 2007. At 9:10 a.m., the trial judge convened court and called the case. Plaintiff was present and answered the call; however, neither Ms. Siliski, Mr. Siliski, nor Mr. Siliski's attorney were in the courtroom. Without making any inquiries, the trial judge immediately dismissed the jury pool, and then stated that "because of the fact that the Defendants are not present the Court is finding that they have waived their right to a jury trial."

The record reflects that Alan Siliski entered the courtroom at 9:15 a.m., at which time Mr. Siliski informed the court that he had been present in the courtroom earlier and that had stepped out of the courtroom momentarily to await the arrival of his attorney. As Mr. Siliski was speaking, his attorney, Mr. Herbison, entered the courtroom. The court informed Mr. Herbison that he had waited until 10 minutes after 9:00 and then released the jury since he had not received any calls to his office and had received no word from the clerk's office that they would be delayed. Mr. Herbison stated to the court that he had instructed his secretary to place a call to the clerk's office to inform them he may be late. The court then inquired into Ms. Siliski's absence. Mr. Siliski stated to the court that it was his understanding she had been dismissed from the fraudulent conveyance action. Mr. Siliski also stated that Mr. Herbison had informed him that the order in which the two cases would be tried had changed, but that Mr. Herbison had not informed him that Ms. Siliski was once again a defendant in the fraudulent conveyance claim. Although Mr. Herbison stated that he had informed Mr. Siliski that Ms. Siliski had been reinstated as a defendant,[5] he acknowledged that he had not attempted to directly contact Ms. Siliski to inform her of that fact. Mr. Herbison then asked the court to recall the jury so that the case could proceed to trial by jury.

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[5] An affidavit subsequently filed with the court by Mr. Herbison stated that:

> 2) I did also state that Jennifer Siliski would now be a party to the fraudulent conveyance case, but at that point I was crossing the street or preparing to cross the street.
>
> 3) I do not know whether Mr. Siliski did or did not hear this part of the conversation, but he did not acknowledge my saying that Jennifer Siliski is still a party to the fraudulent conveyance action.

Despite Mr. Herbison's request to recall the jury, the court maintained its initial finding that Ms. Siliski and Mr. Siliski had implicitly waived their right to a jury trial and that a bench trial would be held. The judge then granted a recess for Ms. Siliski to be contacted. When court reconvened at 10:30 a.m., Ms. Siliski was present and she explained the reason for her earlier absence. Her explanations notwithstanding, the court informed Ms. Siliski that her failure to appear when the case was called constituted a waiver of her demand for a jury trial. When she was informed that the fraudulent conveyance case would proceed to trial without a jury, she expressed her objection and stated that she had not waived her demand for a jury trial. Despite Ms. Siliski's objections and demand for a jury trial, along with those of Mr. Herbison on behalf of Mr. Siliski, the trial court advised that both claims against Ms. Siliski and the one claim against Mr. Siliski would proceed without a jury.

During the course of the trial, Ms. Byrd served as trial counsel for Plaintiff, Mr. Herbison served as trial counsel for Mr. Siliski, and Ms. Siliski represented herself *pro se.* During Plaintiff's case-in-chief, Ms. Byrd called herself as a witness for Plaintiff, to which objection was made based upon the Rules of Professional Conduct. The judge overruled the objection and allowed Ms. Byrd to testify based upon an advisory letter procured by Ms. Byrd from the Board of Professional Responsibility and the trial court's finding that the objection was waived by the party's failure to object to Ms. Byrd's dual role at the beginning of the trial.

Following the conclusion of the trial on the fraudulent conveyance claim on July 5, the trial court issued an order finding that the sale of Ms. Siliski's residence to Mr. Siliski was a fraudulent conveyance under § 66-3-305(a)(2)(B) of the Uniform Fraudulent Transfer Act, and the conveyance was declared void. The breach of contract claim was tried two weeks later, on July 19. At the conclusion of that trial, the court awarded a judgment for Plaintiff in the amount of $145,472.95. Both Ms. Siliski and Mr. Siliski appealed from the judgment in the fraudulent conveyance claim, and Ms. Siliski appealed from the judgment in the breach of contract claim.

Analysis

The appellants have raised numerous issues on appeal. Both appellants contend the trial court erred in determining they had waived their demand for a jury trial. They also contend the trial court erred by allowing Rebecca Byrd to act as trial counsel for Plaintiff and to testify as the principal witness for Plaintiff. They also contend the trial court erred in its finding that the transfer of the home constituted a fraudulent conveyance.[6] We shall first address the trial court's ruling that the Siliskis waived their right to a jury trial by arriving late for trial.

[6] They also contend the trial court erred by excluding the testimony of one of their witnesses, realtor, Ellen Perry, based upon Williamson County Local Rule of Civil Procedure 9. This issue is rendered moot by our decision, and thus it is not discussed.

THE RIGHT TO TRIAL BY JURY

"The right to a jury trial guaranteed by Tenn. Const. art. I, § 6 is one of the most valuable personal rights protected by the Constitution of Tennessee." *Nagarajan v. Terry*, 151 S.W.3d 166, 174 (Tenn. Ct. App. 2003) (citing *Harbison v. Briggs Bros. Paint Mfg. Co.*, 354 S.W.2d 464, 467 (1962); *State Bank v. Cooper*, 10 Tenn. (2 Yer.) 599, 604 (1831)). "The right of trial by jury as declared by the Constitution or existing laws of the state of Tennessee shall be preserved to the parties inviolate." Tenn. R. Civ. P. 38.01.

In civil cases, the right is not self-enforcing. *Nagarajan*, 151 S.W.3d at 174. "A party who desires a jury trial must file and serve a timely demand for a jury in accordance with Tenn. R. Civ. P. 38.02." *Id*. "Any party may demand a trial by jury of any issue triable of right by jury by demanding the same in any pleading specified in Rule 7.01 . . . , or by written demand filed with the clerk, with notice to all parties, . . ." Tenn. R. Civ. P. 38.02. Unless the party identifies specific issues to be tried by a jury, "the party shall be deemed to have demanded trial by jury of all the issues so triable." Tenn. R. Civ. P. 38.04. Once a demand for trial by jury has been made, it "may not be withdrawn without the consent of all parties as to whom issues have been joined." Tenn. R. Civ. P. 38.05.

The foregoing discussion notwithstanding, a party who demanded a jury may be deemed to have implicitly waived the right to a jury trial by their acts or omissions. *Russell v. Hackett*, 230 S.W.2d 191, 192 (Tenn. 1950); *Beal v. Doe*, 987 S.W.2d 41, 47 (Tenn. Ct. App. 1998); *Davis v. Ballard*, 946 S.W.2d 816, 817 (Tenn. Ct. App. 1996). "Courts, however, should indulge in every reasonable presumption against waiver of a jury demand in a civil case." *Nagarajan*, 151 S.W.3d at 176 (citing *Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937)). In this regard, "waiver should not be inferred without *reasonably clear evidence* of an intent to waive," and "when doubt exists, a court should not find that a party who requested a jury waived its right." *Id*. (citing *Garcia-Ayala v. Lederle Parenterals, Inc*., 212 F.3d 638, 645 (1st Cir. 2000); *Lovelace v. Dall*, 820 F.2d 223, 227-28 (7th Cir. 1987); *American Standard, Inc. v. Crane Co.*, 60 F.R.D. 35, 42-43 (S.D.N.Y. 1973); *L & R Realty v. Connecticut Nat'l Bank*, 715 A.2d 748, 753 (Conn. 1998)) (emphasis added).

IMPLICIT WAIVER OF JURY DEMAND

It is well settled in Tennessee that a party may either directly or by implication waive this constitutional right to trial by jury. *Russell*, 230 S.W.2d at 192; *Beal v. Doe*, 987 S.W.2d at 47; *Davis*, 946 S.W.2d at 817. The failure to make an appearance during the trial of a civil action can constitute an implied consent to the waiver of a jury trial. *Russell*, 230 S.W.2d at 192; *Davis*, 946 S.W.2d at 817. The strategic decision of counsel for a party to not make an appearance for the trial of a civil action until after the trial is under way can also constitute an implied waiver of the constitutional right to trial by jury. *Beal*, 987 S.W.2d at 43. We do not, however, believe the mere failure to answer the first call of the docket for the trial of the case, particularly when the party's

absence or tardiness is reasonably justified, constitutes an implicit waiver of a constitutional right as fundamental as the right to trial by jury.

While neither Mr. Siliski nor Ms. Siliski were in the courtroom when the trial of their case was to begin, both of them arrived prior to the commencement of trial and the reasons for their initial absences were reasonably justified, which is substantially different from the circumstances in *Russell*, *Davis*, and *Beal*. To appreciate the significance of the different circumstances, we will discuss the relevant facts of each case below.

In *Russell v. Hackett* there were two defendants, C. B. Taylor and Edgar Hackett. *Russell*, 230 S.W.2d at 191. When that case was called for trial, the plaintiff and Hackett answered ready for trial; however, neither Taylor nor his attorney could be found. Soon thereafter, the trial court announced that the case would be still tried, despite Taylor's absence. Upon motion of the plaintiff, the court awarded judgment by default against the absent Taylor on the issue of liability. *Id*. The plaintiff and Hackett then agreed to waive their right to a jury trial, which had been demanded by the plaintiff, and the court ruled that Taylor had implicitly consented to waiving the jury by his failure to appear. *Id*. The case was tried without a jury, at the conclusion of which the trial court found in favor of the co-defendant Hackett, but rendered a monetary judgment against Taylor. *Id*. Thereafter, Taylor appealed contending that he had not waived his right to a jury trial, that the action was for unliquidated damages, that the trial court should have impaneled a jury to assess the damages regardless of his absence, and that its failure to do so constituted reversible error. *Id*. After examining prior holdings in Tennessee and those in other jurisdictions, the Tennessee Supreme Court concluded that "Taylor having been properly brought before the trial court by service of process, did not appear and defend the suit. Therefore, his consent to the waiving of the jury was implied." *Id.* at 192.

In *Davis v. Ballard*, the plaintiff, Davis, and the defendant, Ballard, had demanded a jury in their pleadings; however, when the case came on for trial, Ballard and his attorney failed to appear. *Davis*, 946 S.W.2d at 816. Davis then informed the trial court he was waiving his right to a jury, and the case was then tried without a jury and with Ballard in absentia. *Id*. At the close of Davis' case, the trial court found Ballard guilty of conversion of Davis' property and entered a judgment against Ballard in the amount of $80,000. *Id*. On appeal, Ballard contended that "he never agreed or consented to the case proceeding to trial without a jury, and that he did not waive his right to have his case heard and decided by a jury" and, therefore, the trial court erred in conducting bench trial without his consent. *Id.* at 817. In the opinion that followed, this Court relied on the Supreme Court's decision in *Russell* holding:

> The law in 1950 required that both parties consent before demand for jury could be waived. The Supreme Court held that the failure to appear is an implied consent to the waiver of jury trial. *Russell v. Hackett*, 230 S.W.2d 191, 192 (Tenn. 1950). Our present law requiring all parties to consent to waiver of a previous jury demand, Tenn. R. Civ. P. 38.05, is the same that existed when the Supreme Court decided *Russell*. Therefore, we must follow the Supreme Court's ruling in *Russell*. In the

instant case, Ballard did not appear at trial, "[t]herefore, his consent to the waiving of the jury was implied." *Id.*

Id.

The last case we find instructive is *Beal v. Doe*, which arose out of a vehicular accident. *Beal*, 987 S.W.2d at 42. The plaintiff, Beal, originally filed suit against two defendants, James M. Sloan, the driver of the vehicle which struck plaintiff from behind, and William Sloan, the owner of the vehicle. *Id.* Thereafter, the Sloans asserted that an unknown driver of a vehicle had abruptly stopped ahead of plaintiff, which forced plaintiff to abruptly stop and at least partially caused the accident. *Id.* at 42-43. Then the plaintiff amended the complaint making the unknown driver a "John Doe" defendant and seeking judgment against the Sloan defendants and John Doe, as well as the unnamed defendant, Tennessee Farmers Mutual Insurance Company, which provided uninsured motorist coverage to Beal. *Id.* at 43. Tennessee Farmers filed an answer to the amended complaint on behalf of John Doe, pursuant to Tennessee Code Annotated section 56-7-1201(e), acknowledging its defense of John Doe and demanding a jury to try the case. *Id.*

When the *Beal* case came on for trial on the jury docket, no one appeared on behalf of John Doe or Tennessee Farmers. *Id.* When the trial court announced that the case would proceed to trial, counsel for the plaintiff and the Sloans announced that they waived their respective demands for trial by jury, and the case proceeded to trial without a jury. *Id.* At the close of the plaintiff's proof, the defendants Sloan settled with the plaintiff, and the bench trial continued solely on the plaintiff's claim against John Doe and the unnamed defendant, Tennessee Farmers. *Id.* Counsel for John Doe and Tennessee Farmers, who had made the strategic decision to not participate in the trial, finally made his first appearance in court before the completion of the proof.[7] *Id.* When he learned that the case was being tried without a jury, he demanded that a mistrial be declared and that a jury be impaneled in accordance with Tennessee Farmers' demand for a jury made in its pleadings. *Id.* The

[7] The basis of this decision was stated by counsel for Tennessee Farmers in his affidavit:

> 7. After careful consideration, I made a tactical decision not to participate actively in the trial of the case. I knew the named defendants' attorney to be capable and was confident he would keep the plaintiff's damages low enough to avoid any underinsured motorist coverage exposure. Because Tennessee Farmers had a subrogation lien for medical payments, any underinsured exposure would require a verdict of at least $35,000. I believed a jury would be unlikely to award more than that amount. I also believed that the jury would be unlikely to assess any substantial percentage of fault to "John Doe" if "John Doe" was not represented at trial. For these and other tactical reasons, I determined not to participate actively in the jury trial. In underinsured motorist cases, it is relatively common for counsel to decide not to participate actively in trials.

Beal, 987 S.W.2d at 44.

demand was denied and the trial continued to completion, after which the trial court entered judgment against John Doe and Tennessee Farmers.[8] *Id.*

On appeal, Tennessee Farmers contended that having demanded a trial by a jury in its pleadings, the demand could not be waived without its consent. *Beal*, 987 S.W.2d at 45. Tennessee Farmers relied on Tenn. R. Civ. P. 38.05, which provided in part that "[a] demand for trial by jury . . . may not be withdrawn without the consent of all parties as to whom issues have been joined." *Id*. This court, however, rejected its argument and found that the absence of counsel for John Doe and Tennessee Farmers for most of the trial was not inadvertent, but a tactical decision not to participate and not to monitor the case. *Id*. at 49. This decision effectively left counsel for plaintiff and counsel for defendants Sloan to their own devices. *Id*. at 49. After finding the reasoning of *Russell v. Hackett* and *Davis v. Ballard* persuasive, the *Beal* court concluded that the appearance of counsel for Tennessee Farmers after the trial had commenced came too late, and the judgment of the trial court was affirmed. *Id*.

DID THE SILISKIS WAIVE THEIR RIGHT TO A JURY TRIAL?

The relevant circumstances pertaining to the Siliskis are easily distinguishable from those in *Russell, Davis*, and *Beal.* When court convened on the day of trial to commence the first of the two trials involving the Siliskis, it is undisputed that Mr. Siliski had been in the courtroom earlier that morning awaiting court to convene, but had gone outside to await the arrival of his attorney, John Herbison, who had called to advise him that he would be a few minutes late. It is also undisputed that Mr. Herbison and Mr. Siliski were in the courtroom within minutes of court convening and prior to the commencement of the trial. It is also undisputed that Mr. Herbison demanded a jury trial for his client, which was denied, and that the case against Mr. Siliski was tried without a jury over his objection.

Ms. Siliski was not present when court convened and did not arrive until after 10:00 a.m.; however, the reason for her initial absence is disputed. Ms. Siliski was advised by Plaintiff during a pretrial conference three days before the trial that Plaintiff was dismissing its claim against her for fraudulent conveyance. Therefore, she had no obligation to attend the trial of that claim because it had been bifurcated from the trial of the only remaining claim against her for breach of contract. It is undisputed that no one personally spoke with Ms. Siliski after the pretrial conference to inform her that Plaintiff had changed its mind following the pretrial conference and was not dismissing its claim of fraudulent conveyance against her. It is, however, disputed whether Ms. Siliski received the letter from Plaintiff that was delivered to her residence advising of the above changes. Finally, it is undisputed that when Ms. Siliski was notified by phone on the morning of the trial that she needed to appear in court, that she promptly appeared, prior to the commencement of either trial, and that she too demanded a jury to try the claims against her.

[8] Total compensatory damages awarded by the trial court for personal injuries to the plaintiff resulting from the accident was $44,750.00 and, pursuant to the comparative fault doctrine, fault was apportioned by the trial court as follows: James M. Sloan 50% and John Doe 50%. *Beal*, 987 S.W.2d at 43-44.

Although sanctions may or may not have been in order, we have concluded that the trial court exceeded its discretion in requiring Jennifer Siliski or Alan Siliski to proceed to trial without a jury, as each of them had timely demanded. If sanctions were in order, the trial court could have looked to Tenn. R. Civ. P. 16.06 for guidance, as the Siliskis' failure to timely appear for trial could be construed as a violation of a pretrial order. The Rule provides:

> If a party or party's attorney fails to obey a scheduling or pretrial order, . . . the judge, upon motion or the judge's own initiative, may make such orders with regard thereto as are just, and among others any of the orders provided in Rule 37.02. In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Tenn. R. Civ. P. 16.06.

In summary, a party may, by implication, waive its constitutional right to trial by jury by failing to make an appearance at trial, as *Russell, Davis*, and *Beal* instruct; however, we are unable to conclude that a party waives a fundamental right guaranteed and protected by the Constitution of Tennessee by merely being a few minutes late for court, especially when the party is in the courthouse awaiting trial counsel or the party has an arguably justifiable reason for not being present at the call of the case. In this case, Ms. Siliski and Mr. Siliski each made a timely demand for a jury trial and their only omission was not being present to answer the call of their case when court convened at 9:10 a.m. More importantly, each of them had a justifiable reason for not being in the courtroom when the case was called, and both of them were in court ready for trial prior to the commencement of trial.

After consideration of the relevant facts and the holdings in *Russell, Davis*, and *Beal*, among others, we find that the trial court exceeded its discretion in depriving Jennifer Siliski and Alan Siliski of their right to a trial by jury. Accordingly, we vacate the judgment of the trial court and remand both of Plaintiff's claims for a new trial.[9]

ATTORNEY AS ADVOCATE AND WITNESS

Our decision renders the other issues moot, nevertheless, in the interest of judicial economy, we shall address the issue raised concerning the trial court's decision to allow Rebecca Byrd to act as both a witness and as an advocate on behalf of Plaintiff in the fraudulent conveyances claim.

[9] Our decision renders moot the issues raised by Ms. Siliski concerning whether the trial court erred in refusing to allow her to present evidence and witnesses during the course of the trial, whether the trial court erred in reinstating her as a party-defendant in the telephone conference, and whether the trial court violated her due process rights by failing to take adequate measures to inform her that she was reinstated as a party-defendant.

Rule 3.7 of the Tennessee Rules of Professional Conduct sets forth the following:

> (a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness except where:
>
> > (1) The testimony relates to an uncontested issue;
> >
> > (2) The testimony relates to the nature and value of legal services rendered in the case; or
> >
> > (3) Disqualification of the lawyer would work substantial hardship on the client.
>
> (b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by RPC 1.7 or 1.9.

On appeal, Ms. Siliski and Mr. Siliski argue that it was improper for Ms. Byrd to represent her firm, Byrd and Associates, and testify in the fraudulent conveyance action. We believe it inappropriate for Ms. Byrd to represent herself in the fraudulent conveyance action. The rule is clear that "a lawyer *shall not* act as an advocate in which the lawyer is likely to be a necessary witness. . . ." Tenn. R. Prof. Resp. 3.7 (emphasis added). We find that none of three enumerated exceptions applies. The testimony concerned contested issues and the testimony did not relate merely to the nature and value of legal services rendered. Therefore, on remand, if Ms. Byrd plans to testify in the fraudulent conveyance action as to contested issues not directly pertaining to "the nature and value of legal services rendered," she should not act as the advocate for Plaintiff in the trial of that action, unless she can establish that disqualification would work substantial hardship on Plaintiff. *See* Tenn. R. Prof. Resp. 3.7(a).

The foregoing ruling, however, does not preclude Ms. Byrd from serving as the advocate for Plaintiff and testifying in the breach of contract action pertaining to the nature and value of legal services rendered in the case as permitted by Tenn. R. Prof. Resp. 3.7(a)(2).

RECUSAL BY THE TRIAL JUDGE

Our decision pertaining to the right to a jury trial does not render moot Ms. Siliski's assertion that the trial judge erred in not recusing himself from this case. Ms. Siliski asserts that the trial judge is biased against her, which precludes her from receiving a fair trial on the breach of contract claim and the fraudulent conveyance claim. We find no merit to this contention, because Ms. Siliski failed to present evidence demonstrating bias.

The party challenging a judge's impartiality "must come forward with some evidence that would prompt a reasonable, disinterested person to believe that the judge's impartiality might

reasonably be questioned." *Davis v. Tenn. Dep't of Employment Sec.*, 23 S.W.3d 304, 313-314 (Tenn. Ct. App. 2000) (citing Tenn. S. Ct. R. 10, Canon 3(E)(1); *Chumbley v. People's Bank & Trust Co.*, 57 S.W.2d 787, 788 (Tenn. 1933); *Holley v. Holley*, No. 03 A01-9812-CH-00391, 1999 WL 1131322, at *4 (Tenn. Ct. App. Dec. 10, 1999)). To be relevant, the proof must pertain to the "judge's personal bias or prejudice against a litigant." *Id*. It is not relevant, and thus does not constitute a basis for recusal, that the judge has a "general opinion about the legal or social issues involved in a pending case." *Id*. (citing *Caudill v. Foley*, No. 01 A01-9903-CH-00187, 1999 WL 976597, at *10 (Tenn. Ct. App. Oct. 28, 1999) (No Tenn. R. App. P. 11 application filed) (quoting Jeffrey M. Shaman et al. *Judicial Conduct and Ethics* § 4.04, at 101-02 (2d ed. 1995))).

In her brief, Ms. Siliski contends that the trial judge was biased against her because he ruled adversely to her in certain pretrial matters, such as denying her request for a continuance, finding that she impliedly waived her right to a jury trial, excluding some of the evidence and witnesses she sought to introduce during the trials, and by ruling in favor of Plaintiff on both of its claims against her. The foregoing facts, however, are wholly insufficient to establish that the judge was biased. We find these facts establish little more than that the trial judge had to make numerous rulings regarding contested matters throughout these protracted and contentious proceedings, and that the trial judge was doing his job as he deemed appropriate.

The "evidence" Ms. Siliski relies on to suggest bias does not constitute relevant or competent evidence that would cause a reasonable, disinterested person to believe that the trial judge's impartiality might reasonably be questioned. The only "evidence" she provided established nothing more than the fact that the trial judge ruled adverse to her on several matters and because of his rulings she believes he is biased, which is insufficient.

We, therefore, find no basis upon which to conclude that the trial judge was biased against Ms. Siliski or that he should be recused.

IN CONCLUSION

The judgment of the trial court awarded in favor of Plaintiff in the breach of contract action and the fraudulent conveyance action are vacated and this case is remanded to the trial court for a new trial on all of Plaintiff's claims. Costs of appeal are assessed as follows: one-half against Plaintiff, and one-half against Mr. Siliski and Ms. Siliski, jointly and severally.

FRANK G. CLEMENT, JR., JUDGE